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IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1975

No. 74-1406

WILLIAM ALRED, - - - - - Petitioner,

versus

UNITED STATES OF AMERICA, - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

THOMAS ROBERTS
2121½ Cumberland Drive
Middlesboro, Kentucky 40965
Attorney for Petitioner

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

INDEX

PAGE

Reports of Opinions and Judgments Below 1

Jurisdiction 1

Question Presented 2

Constitutional Provision Involved 2

Statement of the Case 2– 6

Argument 7–13

Conclusion 13–14

Appendix 1a–16a

1. Proceedings in the Courts Below 1a– 7a
   a. Indictment 1a– 2a
   b. Jury Verdict 2a
   c. Opinion of the United States Court of Appeals for the Sixth Circuit 3a– 7a
2. Testimony in the District Court 8a–16a
   a. Paris Hoskins 8a– 9a
   b. Truman Hays 9a–10a
   c. Logan Middleton 10a
   d. Oscar Haywood 10a–12a
   e. Penny Alred 12a–13a
   f. Geneva Roskie 13a–14a
   g. Pauline Alred 14a–15a
   h. James Eugene Brock 15a–16a
   i. Robert Combs 16a
   j. Jack Howard 16a
   k. Johnny Creech 16a

AUTHORITIES

Constitutional Provisions:

PAGE

Fifth Amendment to the United States Constitution 2, 8

Cases:

Brady v. *Maryland*, 373 U. S. 83 (1963) 9

Dickey v. *Florida*, 398 U. S. 30 (1970) 11

Napue v. *Illinois*, 360 U. S. 264 (1959) 9

Nickens v. *United States* (C.A.D.C. 1963), 323 F. 2d 808 cert. denied (1964) 379 U. S. 905 7

Ponze v. *Fessenden*, 258 U. S. 254 (1922) 10

Ross v. *United States* (C.A.D.C. 1965), 349 F. 2d 210 . . . . . 7, 12

United States v. *Marion*, 404 U. S. 307, 92 S. Ct. 455 . . . . . 8, 9, 10–11

United States v. *Panczko* (CA 7th, 1966), 367 F. 2d 737, cert. denied (1967) 385 U. S. 1009 10

Statutes:

18 U.S.C. §842(h) 2

28 U.S.C. §1254(1) 1

Other:

8A Moore's Federal Practice, §48.03(1) (1973) 8

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1975

No. _____

WILLIAM ALRED, - - - - - - *Petitioner,*

v.

UNITED STATES OF AMERICA, - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on April 8, 1975.

OPINIONS BELOW

The opinion of the jury verdict is unreported and set forth in the Appendix, p. 2a, herein.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 8, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Did a purposeful delay of some fifteen months between identification of the accused and his subsequent arrest prejudice defendant's ability to defend himself thereby violating the due process clause of the Fifth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States:

> "V
>
> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT

Petitioner was indicted for conspiracy to willfully receive, conceal, transport, and dispose explosive materials, knowing that such explosive materials were stolen, or in violation of Title 18, §842(h), U.S.C. Also,

included in the appeal is Count two, wherein the defendant, William Edward Alred, was convicted of individually and jointly carrying a firearm unlawfully during the commission of the conspiracy heretofore described.

The Government's proof in chief consisted of two witnesses, Mr. Paris Hoskins and Mr. Truman Hays. The first Government witness, Mr. Paris Hoskins, testified that he did not see anyone attempting to pry off a lock (Appendix, p. 8a), and that he observed three people passing by him as close as twenty feet (Appendix, p. 8a) away, and that he knew the defendant, William Edward "Rube" Alred for some four or five years (Appendix, p. 8a). Further, this witness testified, "The years that I (he) worked for Mr. Haywood . . . I don't know whether it was 1969, 1970, or 1971, whatever year it was, but when I worked for him sometimes I would see Mr. Alred every day . . . (Appendix, p. 8a) and as a matter of fact had coffee in his house as well" (Appendix, p. 9a).

Finally, under cross-examination, this Government witness testified as follows:

> "Q. And you're telling this jury that a man you have known since 1969 walked by approximately twenty (20) feet from where you were in a trailer, and you did not recognize him as Mr. Rube (William) Alred, is this correct?
>
> A. Yes, sir" (Appendix, p. 9a).

On recross-examination he stated there was *nothing* (emphasis supplied) that he could testify to in Court

from the witness stand which would in any way implicate defendant Alred.

The only Government witness put on by the Government in chief to identify the defendant, William Edward Alred, was Mr. Truman Hays. Mr. Hays testified that he did not recognize the defendant, William Edward Alred, on the night of the alleged crime (Appendix, pp. 9a-10a); but, that he identified him about three days later when he picked him out of some mug shots, *supra*. This eyewitness testimony, made some three days after the alleged crime of October 17, 1972, was the only testimony implicating the defendant in any criminal conduct.

The defense in the instant case was predicated on alibi. The first witness to testify for the defense, Logan Middleton, testified he called defendant Alred and asked if he had heard about (co-defendant) Gene Brock getting shot (Appendix, p. 10a).

The next witness, Oscar Haywood, testified to being at defendant Alred's home when he (Alred) received a telephone call that (co-defendant) Gene Brock had been shot (Appendix, p. 10a). Yet, under cross-examination he could not recall the exact date (Appendix, p. 10a) as being October 17th, 18th, or 19th of 1972. However, even under persistent cross-examination, he could not admit any previous news of this shooting in Harlan prior to this phone call (Appendix, p. 11a) and on redirect testified this telephone call was the first time that he had ever heard anywhere about Gene Brock getting shot (Appendix, p. 13a).

Penny Alred, the daughter of defendant Alred, was the next witness to take the stand and testified to getting a telephone call for her father (Appendix, p. 12a). She heard him say "Gene Brock just got shot in Bell County" (Appendix, p. 13a). Again under cross-examination, she did not know whether the phone call came on October 17th, or not (Appendix, p. 13a), but on redirect testified she had never heard before that night of Gene Brock being shot (Appendix, p. 13a).

Geneva Roskie then testified Mr. Alred's daughter answered the telephone in her presence and told her father, "Daddy, the phone call is for you" (Appendix, p. 14a), and then Mr. Alred said "Gene Brock has just been shot." Then again on cross-examination Geneva Roskie could not recall the day of the month, only that, "it was in October of 1972" (Appendix, p. 14a). Likewise, on redirect examination she testified she had never, "heard of Eugene Brock being shot before this particular night when Mr. Alred answered the telephone and related to you and the people who were there that Mr. Brock had just been shot" (Appendix, p. 14a).

The last witness called by the defense, Pauline Alred, wife of the defendant, recalled making a purchase of roofing, etc., from a local lumber company on October 17, 1972, and that they were delivered on the same day (Appendix, p. 15a).

Also, she recalled her husband receiving a telephone call this same night when he said, "Gene Brock just got shot in Bell County" (Appendix, p. 15a). However, again on cross-examination doubt was cast on the specific date when she testified, "I'm pretty sure

it was on that day that they delivered the stuff. I'm sure it was."

The defense then called Government Agent Hassell Caudill in an unsuccessful attempt to inquire why, if they had reasonable grounds to believe that defendant Alred had committed this crime three days after it occurred, why they waited so long before making the arrest?

Finally, the defense called co-defendant, James Eugene Brock, who testified he had plead guilty to the crime on October 17, 1972, of stealing explosives in Bell County. In addition, Mr. Brock testified he had always maintained, since this crime was committed, that defendant Alred was in no way involved (Appendix, pp. 15a-16a).

The Government then called three witnesses *in rebuttal*. The first, Kentucky State Policeman, Robert Combs, testified he investigated a call in Bell County on October 18th (Appendix, p. 16a), contrary to previous date by the Government eyewitness, Truman Hays.

Also, Kentucky State Policeman, Jack Howard (Appendix, p. 16a) and Johnny Creech, testified the crime in the instant case took place on October 18th, 1972, rather than October 17th, 1972.

ARGUMENT

A Purposeful Delay of Approximately Fifteen (15) Months Between Offense and Arrest in the Instant Case Denied and Prejudiced Defendant's Ability to Defend Himself, and Violated the Due Process Clause of the Fifth Amendment.

Until Judge Skelly Wright in *Nickens* v. *United States* (C.A.D.C. 1963), 323 F. 2d 808, cert. den. (1964, 379 U. S. 905), it was assumed that no constitutional protection was available to the defendant who was a victim of delay in initiating charges against him. Judge Wright's opinion, however, explained how this type of delay might prejudice a defendant more severely than in an ordinary speedy trial situation:

> "Indeed, a suspect may be at a special disadvantage when complaint or indictment, or *arrest* is purposely delayed. With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime. Witnesses disappear. With each day, the accused becomes less able to make out his defense. If, during the delay, the Government's case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags." *Id.* at 813. (Emphasis supplied.)

Two years later this rationale became the basis for the opinion in *Ross* v. *United States* (C.A.D.C. 1965), 349 F. 2d 210, the leading case on preprosecution delay. There the Court dismissed a narcotics indictment where there was (1) a purposeful delay of seven months be-

tween offense and arrest, (2) a plausible claim of inability to recall or reconstruct the events of the day of the offense, and (3) a trial in which the case against appellant consists of the recollection of one witness refreshed by a notebook. (8A Moore's Federal Practice, §48.03(1) 1973.)

Admittedly, there was some ambiguity in *Ross* as to whether the dismissal was predicated on a violation of due process or was in the exercise of the Court's supervisory powers. The Court referred to the violation of rights "akin to Fifth Amendment due process," but at the same time also used language to suggest it was exercising its supervisory powers. *Id.* at 211, 216.

In *United States* v. *Marion,* 404 U. S. 307, 92 S. Ct. 455, 30 L. Ed. 2d 468, however, the Supreme Court considered whether the speedy trial right is applicable to pre-prosecution or pre-indictment delay, holding (with three Justices concurring in the result) that the right is inapplicable in such situations. But the Government conceded in the case that the *due process* clause of the Fifth Amendment "would require dismissal of the indictment if it were shown at trial that the pre-indictment delay . . . caused substantial prejudice to (the right) to a fair trial and that the delay was a purposeful device to gain tactical advantage over the accused." *Id.* at 325.

Thus, the Supreme Court made it abundantly clear in *Marion* dicta "That the Due Process of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay caused substantial prejudice to appellee's right to a

fair trial and that the delay was an intentional device to gain tactical advantage over the accused." *Brady* v. *Maryland*, 373 U. S. 83 (1963); *Napue* v. *Illinois*, 360 U. S. 264 (1959). *Id.* at 324.

Perhaps the reasonableness of any delay is best presented in *Marion* in a concurring opinion by Justice Brennan when this broader question is raised:

> "When is Governmental delay reasonable? Clearly, a deliberate attempt by the Government to use delay to harm the accused, or Governmental delay that is 'purposeful or oppressive' is unjustifiable . . . The same may be true of any Governmental delay that is unnecessary. Whether intentional or negligent in origin. A negligent failure by the Government to ensure speedy trial is virtually as damaging to the interests protected by the right as an intentional failure; when negligence is the cause, the only interest necessarily unaffected is our common concern to prevent deliberate misuse of the criminal process by public officials. Thus, the crucial question in determining the legitimacy of governmental delay may be whether it might reasonably have been avoided—whether it was unnecessary. To determine the necessity for Governmental delay, it would seem important to consider, on the one hand, the intrinsic importance of the reason for delay, and, on the other, the length of the delay and its potential for prejudice to interests protected by the speedy-trial safeguard. For a trivial objective, almost any delay could be reasonably avoided. Similarly, lengthy delay, even in the interests of realizing an important objective, would be suspect." 398 U. S. at 51-52.

In the instant case, fifteen months had elapsed between the time the defendant was "accused" by the only Government witness and the time he was arrested, although the trial took place less than six (6) months after the arrest and indictment on January 24, 1974.

While counsel will admit "in some types of criminal prosecution, of course, delays before complaint will often be unobjectionable, when involved investigations, difficult prosecuting decisions, or complex preparations for the Grand Jury are necessary, the delay may be warranted. When the authorities are unsure against whom to proceed, or doubtful of the adequacy of the case, then, of course, no formal charges should be brought." 323 F. 2d at 813. Cf. *United States* v. *Pancsko* (CA 7th 1966), 367 F. 2d 737, cert. den. (1967) 385 U. S. 1009.

However, the Government made absolutely no showing in the instant case for a delay even though their only witness testified he identified the defendant three (3) days after the alleged crime in 1972 (Appendix, p. 10a). As pointed out in the concurring opinion in *Marion* by Justice Douglas:

> ". . . The public is concerned with the effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. Just as delay may impair the ability of the accused to defend himself, so it may reduce the capacity of the Government to prove its case. See *Ponze* v. *Fessenden*, 258 U. S. 254, 264 (1922).
>
> "Moreover, while awaiting trial, an accused who is at large may become a fugitive from justice

or commit other criminal acts. And the greater lapse of time between commission of an offense and the conviction of the offender, the less the deterrent value of his conviction." *Dickey* v. *Florida*, 398 U. S. 30, 42 (1970).

Defendant attempted to show alibi for his defense and had he been notified of pending charges against him, he could have taken steps to preserve his memory and those around him on the night in question. Several witnesses testified defendant received a telephone call on the night of the alleged crime and he (defendant) stated Gene Brock had been shot in Bell County (Appendix, pp. 10a, 12a, 13a and 14a). The Government was unable to show the defendant did not get such a call, they only emphasized a lack of ability of Penny Alred, Perry Fowler, Roskie Hoskins, and Oscar Haywood to remember the precise date of the call. Even his wife, Pauline Alred, was not absolutely sure of the exact date, merely that she was "pretty sure it was on the day they delivered the stuff," speaking about certain materials for her home.

Surely, this Court is not so cosmopolitan that it cannot appreciate the swiftness which news of a shooting takes place in a small town. The fact that while none of the witnesses could testify as to the exact date in question all of them testified they had never previously heard of the shooting prior to the telephone call. Would it not have been more reasonable to presume they could have been more specific of such a date had the defendant been arrested as soon as he had been identified three days after the alleged crime? Did not

the Government's willful failure to act or arrest impair the ability of the defendant to defend himself?

The only evidence offered by the Government which in any way implicates the defendant was the eyewitness testimony of Truman Hays, who was alleged to have identified the defendant three (3) days after the alleged crime (Appendix, p. 10a). Counsel submits to the Court that the Government must have had some doubt as to defendant's guilt which they did not disclose or else they would have arrested the defendant immediately. If they had no doubt of defendant's guilt, the only other possible motive for not accusing the defendant was to impair the ability of the accused to defend himself.

As stated in *Ross, Ibid.* at 213:

> ". . . the Constitution contemplates a separate interest in fair procedures for the citizen faced with the loss of his liberty by reason of criminal charges. When interests of this nature impringe upon each other, as they have a way of doing, they must be accommodated. A balance must be struck, if one or the other is not to be sacrificed completely. We see no inevitable necessity for such sacrifice here. . . . The building of framework of procedural fair play, like other constructions, rests to some degree upon probabilities. And the probabilities here are in favor of the shorter period."

The blame for any such delay certainly cannot be allowed to fall on the defendant in the instant case because counsel for the defendant called Hassell Caudill,

Resident Agent in charge of the Pineville, Kentucky post of the Treasury Department in an effort to inquire about such a delay. Not only would the Court not allow counsel to show a lapse of time in the instant case, but the Trial Court denied the defendant the right to impeach the Government's case by pointing out that a law officer has the right to arrest for a felony without a warrant at any time he has reasonable grounds upon which to believe a felony has been committed.

What other reason could the Government have in the instant case for delay in arresting the defendant, unless they doubted his guilt? There was absolutely no showing of any new evidence during the fifteen (15) months against the defendant. If the Government had reason to believe the defendant was guilty three (3) days after the crime, absent the showing of new or additional evidence or excuse, the Government had a duty to make an arrest.

We can only conclude the Government's inaction was prejudicial to the defendant's ability to defend himself and consequently violated the defendant's due process under the Fifth Amendment.

CONCLUSION

With the utmost respect, it is submitted that the long unexplained delay of some fifteen (15) months between the time petitioner was identified and subsequently arrested caused substantial prejudice to petitioner's right to a fair trial. In addition, petitioner was denied his right to show that the delay was a purposeful device to gain a tactical advantage over the

petitioner by making it impossible to recall or reconstruct the events of the day of the offense.

I suggest this is a most serious constitutional issue, in dire need of definitive guidelines as to when actual prejudice takes place so as to afford proper constitutional protection to those victims of undue delay having charges brought against them. This case offers the Court an opportunity to clear up the confusion between pre-indictment delay and due process under the Fifth Amendment. The place and time to provide such guidelines for substantial prejudice is here and now. Counsel hereby asks the Court to do so.

Respectfully submitted,

THOMAS J. ROBERTS
2121½ Cumberland Avenue
Middlesboro, Kentucky 40965
Attorney for Petitioner